Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States of America

October Term, 1990

MR. FURNITURE WAREHOUSE INC., ET AL.,

Petitioners,

vs.

BARCLAYS/AMERICAN COMMERCIAL INC., ET AL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a corporate employer be able to avoid the imposition of an award of punitive damages resulting from the torts of its employee merely because (i) the corporate employer is not shown to have been "independently at fault", or (ii) because the employee who committed the tort is not shown to have been the primary owner or the managing agent of the corporation?

2. If, under Florida law, a corporate employer will be liable for punitive damages resulting from the torts of its employees only if the corporation is shown to be independently at fault or the employee committing the tort is the primary owner or the managing agent of the corporation, will not such a rule be an incentive for the corporate employer to minimize the oversight of its agents?

3. In light of this Court's pronouncements in *Pacific Mutual Life*[1] - and the rationale evidenced in such pronouncements - did the Eleventh Circuit Court of Appeals err in the instant cause when it denied the opportunity to Petitioners to recover an award of punitive damages as against Respondent, on the grounds that Petitioners had not met their burden under *Mercury Motors*[2]?

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[1]*Pacific Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 499 U.S. _____(1991)

[2]*Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981)

4. Does the rule in *Mercury Motors, supra,* violate the due process clause under the Fourteenth Amendment - and is it unconstitutional - in that it requires a finding of "independent fault", where, although it is acknowledged that the state has an interest in minimizing corporate torts, the rule in *Mercury Motors* would encourage corporate torts?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioners: Mr. Furniture Warehouse, Inc., Mr. Wholesale, Inc., Mr. Furniture of Miami, Inc., Mr. Furniture Mart, Inc., Mr. Cars, Inc., Mr. Home Furnishings, Inc., Mr. Property, Inc., Mr. West Palm Furniture, Inc., Mr. Furniture of Florida Holding Company, Inc., Cassett's Furniture, Inc., Mr. Furniture of Fort Lauderdale, Inc. (all of the above corporations, with the exception of Mr. Wholesale, Inc., had operated or do operate under the trade name "Mr. Furniture".); and the Respondent is Barclays-American Commercial, Inc. Barclays American Corporation is the parent of Barclays/American Commercial, Inc.

Those companies having done business under the trade name of "Mr. Furniture" are collectively referred to herein as "Mr. Furniture."

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REFERENCE TO OFFICIAL REPORTS

This Petition for Writ of Certiorari is directed to the following decision: *Mr. Furniture v. Barclays American/Commercial Inc.*, 919 F.2d 1517 (11th Cir. 1990).

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE COURT IS INVOKED

This petition for Writ of Certiorari seeks review of the opinion of the United States Court of Appeals, Eleventh Circuit, which was entered on December 27, 1990 and is reprinted in a separate Appendix. The Petition for Rehearing was denied pursuant to the Order of the Court of Appeals dated February 7, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.SC. §1254(1).

STATEMENT OF THE CASE

A. Factual background of the Case.

During the times that they were active businesses, those companies operating under the trade name "MR. FURNITURE" were engaged in the retail sale of furniture in the South Florida market. MR. WHOLESALE had been engaged in the wholesale distribution of home furnishings to the MR. FURNITURE stores and other retailers of furniture. Howard Cassett had been the President, Chief Executive Officer and majority shareholder of MR. FURNITURE and MR. WHOLESALE. (R 10 - 195 - 2,3)

The furniture industry is cash-intensive, both for the manufacturer and retailer. (R 5 - 141 - Aff. of Faust, p. 9) Purchasers of furniture like MR. FURNITURE typically cannot survive by paying cash for the goods. Although some manufacturers will extend their own "in-house" trade credit, many manufacturers instead employ the services of a commercial factor. For the furniture industry, one of the largest commercial factors is Respondent, BARCLAYS.

As a commercial factor, BARCLAYS purchases accounts receivable of the manufacturer, usually at a discout, and takes an assignment of the accounts receivable. (R 14 - 258 - 66) In this fashion, the buyer of the goods, *e.g.* MR. FURNITURE, is advised by BARCLAYS to remit payment directly to BARCLAYS. However, before electing to "factor" a given transaction, BARCLAYS makes an independent decision as to the creditworthiness of the buyer, referred to in the industry as the "customer". (R 14 - 258 - 26, 27) If BARCLAYS decides that the customer is not creditworthy, BARCLAYS will so advise the manufacturer of its decision, and the manufacturer - referred to as the "client" - advises the customer that BARCLAYS has declined to factor.

Many of the manufacturers from whom MR. FURNITURE sought to purchase goods utilized BARCLAYS as their factor. BARCLAYS' factoring agreements with those clients (sellers - manufacturers) typically were exclusive in nature, contractually binding the BARCLAYS client to BARCLAYS, *i.e.* the clients agreed to retain BARCLAYS as their sole factor. (R 9 - 183 - Exhibit No. 1).

MR. FURNITURE had always been deemed creditworthy and had been credit approved by all commercial factors. (R 1 - 35) However, commencing in 1986, MR. FURNITURE began regularly receiving advisements from clients of BARCLAYS - and only BARCLAYS - that BARCLAYS had refused to factor those transactions in which MR. FURNITURE and MR. WHOLESALE sought to purchase furniture. One such client of BARCLAYS that had been notified of a credit "turn-down" on MR. FURNITURE was Braxton-Culler, Inc.

Louis Patermo had been a salesman for Braxton-Culler, and was the individual representing B raxton-Culler who had negotiated orders with MR. FURNITURE. (SR 2 - 283 - 3) Upon learning of the credit turn-downs, Mr. Patermo contacted Linda Strickland, the credit officer at BARCLAYS who handled Braxton-Culler's account. Mr. Patermo, on two separate occasions, inquired of Strickland as to why BARACLAYS had refused to credit approve MR. FURNITURE. (SR 2 - 282 - 8, 12) Each time, Strickland

advised Patermo that the reason why BARCLAYS had refused to credit approve MR. FURNITURE was because MR. FURNITURE was raising inventories and credit and was going out of business. (SR 2 - 282 - 9, 13) In the parlance of the industry, this is known as planning a "bust-out".

Upon learning what Strickland had said to Patermo regarding MR. FURNITURE, Howard Cassett then inquired of other furniture salesmen what they had heard about MR. FURNITURE's and MR. WHOLESALE's business reputations in general. (SR 3 - 281 - 56) Many such salesmen - who had begun avoiding doing business with Petitioners - told Mr. Cassett that they too had heard of MR. FURNITURE's plans to do a "bust-out".

Mr. Cassett contacted BARCLAYS to ascertain why BARCLAYS had refused to credit approve Petitioners. After some time, Mr. Cassett was put in touch with Strickland's supervisor, Mr. James Stenhouse, an individual Howard Cassett knew from the past. (JR 17 - 260 - 542)

In 1978, Stenhouse wa a credit officer employed by Southeastern Financial Corporation, BARCLAYS predecessor. (R 14 - 258 - 110) Among the clients Stenhouse had assigned to him were companies that did business with G & M Company ("G&M") and Howard's Furniture Clearance Center, Inc. ("HFCC"). R 14 - 258 - 114) The principal shareholder of these companies had been Mr. Eugene Cassett, father of Howard Cassett. (SR 1 - 283 - 4, 5)

In the 1970's, G&M and HFCC had as their major supplier of furniture a company known as Stuart Furniture Company. (SR 1 - 283 - 8) Stuart Furniture had employed the factoring services of Southeastern Financial Corporation, and Stenhouse was assigned Stuart as one of his accounts. (R 14 - 258 - 114) According to the testimony of Eugene Cassett and Howard Cassett, there came a time when Stenhouse advised Eugene Cassett that Southeastern Financial Corp. would not credit approve a shipment of goods from Stuart Furniture to HFCC and G&M because G&M and HFCC had reached their credit limit with Southeastern Financial Corp. (SR 1 - 283 - 7) Eugene Cassett allegedly begged Stenhouse

for the goods and offered Stenhouse a "two for one payment", *i.e.* if Stenhouse would allow for the release of a shipment of Stuart products, G&M and HFCC would pay Southeastern Financial Corp. twice the amount of such shipment. Stenhouse declined the offer. (SR 1 - 283 - 9) The inability of HFCC & G&M to obtain the Stuart Furniture products allegedly led to the demise of G&M and HFCC, forcing them into bankruptcy. (SR 1 - 283 - 9)

When it became apparent that G&M and HFCC were heading for bankruptcy, Stenhouse called Eugene Cassett and said that he would now accept Mr. Cassett's earlier offer. Eugene Cassett said it was too late. Stenhouse then told Eugene Cassett, "I'll never forget you for this one", and further said that he would get even with Mr. Cassett. (SR 1 - 283 - 9)

In the Chapter 11 Bankruptcy proceedings of G&M and HFCC, Stenhouse's employer, Southeastern Financial Corp. sustained losses exceeding $30,000.00. (R 15 - 259 - 228) Although Stenhouse, himself, would later rise up the corporate ladder at Southeastern Financial, n/k/a BARCLAYS, his employee file maintained by BARCLAYS indicated that his climb up the corporate ladder was not all that easy.

Specifically, the personnel file of Stenhouse, reflects that in April, 1979, Stenhouse's supervisor recommended that Stenhouse be transferred out of the credit department, noting that Stenhouse "substantially fails to obtain expectations." (R 15 - 259 - 206) In addition, in an employee review of Stenhouse, dated September 11, 1979, Stenhouse was denied a promotion, and was again denied promotions and salary increases on September 16, 1979 and August, 1980. (R 15 - 259 - 212, 214) Significantly, these negative performance appraisals followed on the heels of the bankruptcy filing of G&M and HFCC and the resulting loss of $30,00 to Southeastern Financial Corp. It was and is the allegation of Petitioners that Stenhouse carried out on his threats to get even with Mr. Eugene Cassett, Howard Cassett's father, by later using his power at BARCLAYS to see to it that MR. FURNITURE, principally owned by Howard Cassett, and not at all owned by his father, would not be credit approved by BARCLAYS.

B. *Procedural background of the case.*

The issues presented herein derive from an action brought by MR. FURNITURE, MR. WHOLESALE and Howard Cassett aginst BARCLAYS and Stenhouse in the Florida State Court. BARCLAYS caused the removal of the case to the United States District Court for the Southern District of Florida. (R 1 - 1)

The initial Complaint set forth counts for defamation, conspiracy to defame and intentional infliction of emotional stress. Upon motion of BARCLAYS, the lower court dismissed the count for intentional infliction of emotional distress. (R 1 - 15)

MR. FURNITURE later sought and obtained leave from the District Court to join various corporations doing business as MR. FURNITURE, all of which were alleged to have been affected by the complained of defamation. (R 1 - 45) Further, Petitoners likewise obtained leave to amend their Complaint to add two additional counts for antitrust violations. (R 2 - 72)

BARCLAYS then filed, among other things, an Omnibus Motion for Summary Judgment, seeking partial summary judgment as to various claims of the Plaintiffs below. (R 3 - 103) Upon such motion, the District Court granted Partial Summary Judgment as to the Conspiracy to Defame Claims and the Antitrust Claims. (R 10 - 193 - 7) Thus, the case went to jury trial in the District court on the sole remaining count of defamation. At the outset of trial, Howard Cassett was dismissed as a party plaintiff, and during the course of the trial proceedings, James Stenhouse was dismissed as a party defendant.

At the close of MR. FURNITURE's case, BARCLAYS moved for entry of Directed Verdict, and the Court, after entertaining argument, reserved ruling on the Motion. Similarly, the Court reserved ruling on the same Motion made at the close of the evidence.

The jury returned a Special Verdict Interrogatory Form, finding that BARCLAYS had defamed MR. FURNITURE and MR.

WHOLESALE, and awarded nominal damages. (R 13 - 250) Final Judgment was thereafter entered by the District Court in favor of MR. FURNITRUE and MR. WHOLESALE. (R 13 - 254) Further, on the same date Final Judgment was entered, the District Court also entered the Order Granting Directed Verdict on the Question of Punitive Damages. (R 13 - 253) It was from that Order, as well as the Partial Summary Judgment on the Antitrust Claims, that MR. FURNITURE and MR. WHOLESALE filed their appeal in the Eleventh Circuit Court of Appeals.

As it relates to the issues presented herein, the matters before the Appellate Court were: (i) was reversible error committed as a result of an irregularity in the verdict form, in that the verdict form allowed for the jury to award appellants nominal, general or actual damages - which the jury did - but was so structured as to impede the jury's consideration of punitive damages, and (ii) did the lower court err when, after rendition of the verdict, it entered the order granting directed verdict on the question of punitive damages. The Eleventh Circuit noted, however, "It is clear to us, however, that these two grounds for appeal merge into the determination of the propriety of the directed verdict." *Mr. Furniture v. Barclays American/Commercial, Inc.*, 919 F.2d at 1523.

As had the District Court, the Eleventh Circuit based its decision upon the rule as enunciated in the Florida Supreme Court decision in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981). In the final analysis, the Eleventh Circuit held that MR. FURNITURE was not entitled to have the jury deliberate on an award of punitive damages in its favor because (i) MR. FURNITURE and MR. WHOLESALE had failed to meet their burden under *Mercury Motors, supra,* and (ii) Stenhouse was not the managing agent or primary owner of BARCLAYS, a requirement that needs to be found in accordance with *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985).

This present Petition for Writ of Certiorari has been filed, seeking a determination that the rule as enunciated in *Mercury Motors* is unconstitutional, violative of the due process clause under the Fourteenth Amendment and conflicts with the recent

rulings and pronouncements of this Court as stated in the case of *Pacific Mutual Life v. Haslip*, 111 S.Ct. 1032, 499 U.S. _____(1991).

ARGUMENT

In the State of Florida, pursuant to the doctrine of *respondent superior*, a plaintiff may recover compensatory damages against a corporate employer for wrongs committed by a corporate employee, provided that the employee committed the complained of act within the course and scope of his employment. *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla. 1981) ("An employer is vicariously liable for *compensatory* damages resulting from the negligant acts of employees committed within the scope of their employment even if the employer is without fault.") [Emphasis in original]. However, in order to recover an award of punitive damages as against the employer resulting from the same unlawful act, a plaintiff must plead and prove that the employer was independently at fault and that such independent fault foreseeably contributed to the plaintiff's injury. *Mercury Motors, Id; Urling v. Helms Exterminators, Inc.*, 464 So.2d 451, 455 (Fla. App. 1st Dist. 1985).

Those acts which may be categorized as independent fault include: (i) having actual or constructive knowledge that the employee would commit the wrong; (ii) improper training of the employee; (iii) improperly supervising the employee; (iv) negligently hiring or retaining the services of the employee, and (v) inducing, authorizing or ratifying the unlawful act of the employee. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923, 929 (Fla. App. 3 Dist. 1983).

The ostensible rationale for the imposition of this "independent fault" requirement was spelled out in *Mercury Motors*, and may be succinctly stated: Inasmuch as punitive damages go beyond the actual damages suffered by the injured party, and, inasmuch as punitive damages are imposed only as a punishment to the defendant and as a deterrent to others, employers should not be charged with punitive damages unless they foreseeably contributed, *i.e.* were independently at fault, for the wrong complained of. *Mercury Motors, Id.*

An exception to this rule was recognized by the Florida Supreme Court in *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985). There, the employee that committed the tort was the President and Chairman of the Board of the corporation, Bankers. Under these sets of facts, the *Bankers* Court specifically held that:

> We disavow the contention that *Mercury Motors, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981), is applicable in this case. That decision was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation.

Bankers Multiple Line Insurance Co., 464 So.2d at 533.

Thus, where the employee committing the wrong is the managing agent or the primary owner of the corporation, liability will be attributed to the corporate employer, and proof of foreseeable, independent fault is not required. See, *e.g. P.V. Construction Corp. v. Atlas Pools of the Palm Beaches, Inc.*, 510 So2d 318 (Fla.App. 4 Dist. 1987) (Corporation not immune from liability for the intentional tort of its president and chief operating officer); *Kent Insurance Co. v. Schroeder*, 469 So.2d 209 (Fla.App. 5 Dist. 1985) (Act of corporate president while acting withing the scope of his employment was indistinguishable from acts of corporation itself, so that corporaion is liable for punitive damages.)

As noted above, in the instant cause, Petitioners were denied the opportunity to recover an award of punitive damages against BARCLAYS because (i) they had not met their burden under *Mercury Motors, supra, i.e.* had failed to demonstrate the requisite "independent fault", and (ii) had failed to prove that Stenhouse was the managing agent or the primary owner of BARCLAYS. Thus, even though the jury had found that BARCLAYS had defamed Petitioners, and, even though punitive damages are otherwise recoverable upon a finding of defamation, BARCLAYS escaped liability for a possible award of punitive damages as against it.

The rationale behind *Mercury Motors, supra,* while at first blush appetizing, does not and should not hold up upon further scrutiny, for such rationale appears to be an invitation to corporations to clandestinely commit willful and wanton torts of all nature and kind, and to avoid liability for punitive damages by claiming that it was not "at fault", that it did not have knowledge of its emplohee's wrongdoing and that the employee was not so high up on the corporate ladder that the employee's acts can be attributed to the corporation. Simply stated, the rule in *Mercury Motors* (taken together with the "exception" in *Bankers)* would allow devious corporations to secretly designate a mid or low-level employee to commit egregious torts and escape liability for punitive damages which might otherwise be properly imposed. Such a rule should not be countenanced by this Court, and, indeed, this Court in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032, 499 U.S. _____ (1991) has apparently rejected such a rule.

In *Pacific Mutual Life, supra,* this Court was presented a constitutional challenge to a large award of punitive damages entered against a corporate employer for the wrongs comitted by one of its agents within the course and scope of his employment. Unlike Florida law, Alabama law (which was the state law at issue), imposed liability upon the corporation for both compensatory and punitive damages for the frauds committed by employees within their scope of their employment.

In discussing whether the imposition of punitive damages advances the State's goal in minimizing fraud, this Court stated:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be presented." *Louis Pizitz Dry Goods Co. v. Yeldell,* 274 U.S. 112, 116 (1927). If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot

say this is a violation of Fourteenth Amendment due process. See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp*, 454 U.S. 556 (1982); *Pizitz*, 274 U.S., at 115.

Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. at ____; 59 LW 4157, 4160 (1991)

As the above-cited language indicates, this Court has acknowledged that a rule requiring a finding of "independent fault" (i) does *not* advance the state's interest in minimizing fraud and corporate oversight of corporate agents and employees, and (ii) will actually lessen the deterrence of fraud - and will, perhaps, even encourage fraudulent and tortious practices. And, indeed, Florida's interest in deterring fraud is no less than Alabama's, so that the requirements set forth in *Mercury Motors, supra*, may be deemed to be violative of the state's interest and violative of the Fourteenth Amendment due process clause.

This Court has long recognized, in a variety of contexts, the need for corporate employers to vigilantly supervise their employees, and has tended to negate rules of law that would otherwise diminish corporate liability for the unlawful acts of corporate employees. Thus, for example, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation* , 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (*"ASME"*) this Court, applying long-established precedent, rejected a claim that a principal should not be liable for the unlawful acts of one of its agents where such acts did not benefit the principal. In *ASME, supra*, the alleged wrong committed by the agent was an antitrust violation. There, the *ASME* court explained its rationale:

> It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure

[will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States v. A & P Trucking Co.*, 358 U.S. 121, 126, 79 S.Ct. 203, 207, 3 L.Ed.2d 165 (1958).

ASME, 102 S.Ct. at 1946.

As the requirements of *Mercury Motors, supra,* may very well encourage corporate fraud or wrongdoing or, at the very least, lessen corporate oversight of its agents and employees, this Court should, as it has consistently done in the past, give great scrutiny to these requirements and determine that such requirements are contrary to the state's interest in minimizing fraud and wrongdoing and is otherwise violative of the Fourteenth Amendment due process clause.

CONCLUSION

Petitioners, MR. WHOLESALE, INC. and those separately incorporated entities having done business under the trade name of MR. FURNITURE, believe that, from the authorities cited in this Petition for Writ of Certiorari, the Florida Supreme Court decision in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981) is unconstitutional, conflicts with this Court's pronouncement in the recent case of *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 499 U.S. _____1991) and is violative of the due process clause of the Fourteenth Amendment, in that it impinges upon the state's interest to minimize corporate fraud and wrongdoing generally. As a consequence, it is respectfully requested that this Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the Petition for Writ of Certiorari were mailed to Kenneth B. Robinson, Esquire, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 500 East Broward Boulevard, Suite 1350, Fort Lauderdale, Florida 33394, (305) 765-0500, this 8th day of May, 1991.

SHELDON ROSENBERG, ESQ.